Supreme Court, U.S.
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NO.85-14000

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ITT CONTINENTAL BAKING CO.

PETITIONER,

vs.

WALTER MACON,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of
Appeals For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the decision by the Sixth Circuit that a complaint for breach of contract/ breach of duty of fair representation need not be served within the six-month limitation period set forth in 29 U.S.C. § 160(b) presents a question of federal law to which the Supreme Court's guidance is needed.

II.

Whether the Sixth Circuit erred in failing to apply the language of 29 U.S.C.§160(b) and accordingly whether its decision erroneously applies the Supreme Court's holding in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

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BREIF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 779 F.2d 1166 (1985).

JURISDICTION

The Petitioner invokes jurisdiction under favor of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Respondent accepts the statement of the Petitioner as to the relevant laws and Rules.

STATEMENT OF THE CASE

Walter Macon, the Respondent, was an employee of ITT Continental Baking Co., Inc. (hereinafter "ITT") and a member of Bakery Driver's Union Local 52 (hereinafter "Local 52"). On October 26, 1981, members of ITT managment met with Macon and a Local 52 representative. Macon was informed that an ITT customer had alleged that Macon had been

overcharging him for deliveries. Macon was also told that if proven, the overcharging would constitute "dishonesty" under the collective bargaining agreement Therefore, Macon would be subjected to possible sanctions, including discharge without a prior hearing. He was suspended pending further investigation.

On November 18, 1981, at a second meeting attended by Macon, two Local 52 stewards, Macon's attorney, and ITT management, Macon was informed that the previous allegation had been confirmed and a second complaint of irregular charging had been uncovered. Macon was summarily discharged for dishonesty.

On May 18, 1982, exactly six months after his discharge, Macon filed a complaint in the United States District Court for the Northern District of Ohio against ITT and

Local 52 under Section 301 of the Labor Managment Relations Act (hereinafter "LMRA"/),29 U.S.C. §185, claiming his discharge violated the ITT-Local 52 collective bargaining agreement and that Local 52 had breached its duty of fair representation.

The complaint was served within the 120 days mandated by Rule 4(j) of the Federal of Civil Procedure. The Petitioner filed a motion to dismiss or in the alternative for summary judgment. The trial judge granted both motions. The sole issue on appeal was "does the six-month limitation upon hybrid 301/fair representation suits borrowed from Section 10(b) of the NLRA borrow as well the requirement that both filing and service of the complaint be accomplished within the six month period."

The Sixth Circuit Court of Appeals ruled that such actions are governed by the filing and service requirements of the Federal Rules of Civil Procedure. Accordingly, the trial court's judgment was reversed and the case remanded.

REASONS FOR DENYING THE PETITION

We rely upon the opinion of the Court of Appeals, 779 F.2d 1166 (1985), to support our position that the Federal Rules of Civil Procedure govern the filing and service requirements of hybrid 301/fair representation suit, which thoroughly reject the position here being urged by the Petitioners. In amplification of our thesis, it should also be noted that the six-month limitation "borrowed" from Section 10(b) of the NLRA was borrowed for two purposes, to

fill a gap in federal law and to implement a uniform statute of limitations upon actions of this type. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

In DelCostello, this Court ruled that "§10(b) should be the applicable statute of limitations governing suits against the employer and against the union." Id. at 155. Also "the subject matter of §301 is "peculiar (sic) one that calls for uniform law'". Id. at 162 (quoting from Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962)). Section 10(b) was utilized to define the period of time during which the action could be brought and after which the action would be barred. This Court's entire focus was directed to that point. No mention was made of any requirement that service be effectuated within the six-month period.

Consequently, there is no language in DelCostello which even insinuates this Court intended to borrow from §10(b) any more than a filing date requirement.

Petitioner argues that the Third, Ninth, and Eleventh Circuit Courts of Appeal have ruled that the six-month filing and service requirement is the proper interpretation of DelCostello. And, indeed they have so ruled. Howard v. Lockheed-Georgia Co., 472 F.2d 612 (11th Cir. 1984), Simon v. Kroger, 743 F.2d 1544 (11th Cir. 1984). In our view, the error in both the Petitioner's and the Third, Ninth, and Eleventh Circuits' contentions is readily discernible. For example, in Simon, the Eleventh Circuit found that "the intent spirit and plain language of section 10(b) require that a coomplaint be both filed and served within the six month limitation period". Id. at 1546 (emphasis added).

Indeed, Section 10(b) does provide in relevant part that:

> Whenever it is charged that any person had engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed not less than five days after the serving of said complaint; provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of copy thereof upon such person against whom such charge is made...

Given this language, it seems clear enough that Petitioner and the Third, Ninth, and Eleventh Circuits are operating under the erroneous belief that the terms "charges" and "complaint" are synonymous when in fact they are not. On this point, it

has been held that "[t]he six-month limitation applies only to the filing of the charge, not the issuance of the complaint by the General Counsel." N.L.R.B. v Local 264, Laborers' International Union. 529 F.2d 778 (8th Cir. 1976). As was noted by the Court in N.L.R.B. v. Local 264 the House of Representatives attempted to provide a requirement that the complaint had to issue within six months of the filing of the charge. The requirement was eliminated in Conference Committee Report, H.R. Rep 510, 80th Cong. 1st Sess. 53 (1947) reprinted in U.S. Code Cong. Serv. 1135, 1159 (1947).

This being so, it may suffice to simply note this Court has made the point that the charges served only set the investigation process in motion. N.L.R.B. v. Fant Milling Co., 360 U.S. 301 (1959). If this assessment is valid, and these apparent definitional

errors are factored into the Third, Ninth, and Eleventh Circuits' interpretation of DelCostello as related to §10(b), then surely their analysis cannot survive meaningful scrutiny.

Also important here is the fact that in DelCostello, the §10(b) limitation was actually borrowed to fill.a gap in federal law. Id., at 170 n. 21. However, it is at least arguable that there is no gap in federal law as to service and filing of a complaint. See, Rule 3 of the Federal Rules of Civil Procedure. Rule 3 clearly provides that a civil action is commenced by the filing of a complaint and Rule 4(j) mandates service of summons within 120 days after the filing.

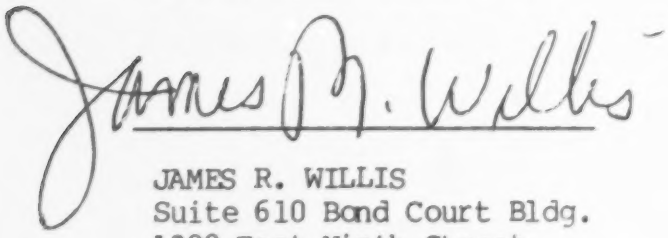
From the above analysis, the relevant factors are: (1) a civil action commences with the filing of a complaint; (2) the

Federal Rules of Civil Procedure provide for service within 120 days; (3) the six-month limitation was borrowed from §10(b) for 301/fair representation suits to fill a gap in federal law; (4) DelCostello only addressed a filing date requirement and not a service date requirement and (5) the terms "charges" and "complaint" referred to in §10(b) are not synonymous and should be distinquished in all cases of this ilk. Once this is done, the cogent reasoning of the Sixth Circuit should not be disturbed.

CONCLUSION

The Petition for Writ of Certiorari is without merit and should be denied.

Repsectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Brief on Opposition was sent by ordinary U.S. Mail, postage paid, to the Attorney for Petitioner this 28th day of May, 1986 to the following address:

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